



OFFICE OF THE ATTORNEY GENERAL • STATE OF TEXAS
JOHN CORNYN
June 30, 2000

Ms. B.J. Hemmeline
Civil Chief
Lubbock County Criminal District Attorney's Office
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2000-2498

Dear Ms. Hemmeline:

You ask whether certain information is subject to required public disclosure pursuant to the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 136671.

Lubbock County (the "county") received a request for various information concerning an incident occurring on April 30, 1998 in the county jail where an inmate, Ollie Johnson, was allegedly assaulted by jail officials. The requestor, who represents Mr. Johnson, seeks information, itemized into seventeen categories, regarding county correspondence, memoranda, and reports concerning settlement claims and Mr. Johnson's incarceration, and policies and procedures; she also asks for seven categories of information relating specifically to Mr. Johnson.¹ You state that a portion of the information will be disclosed to the requestor. You argue that a portion of the information is excepted from public disclosure in accordance with a 1999 ruling issued by this office. You also contend that some of the information is excepted from disclosure pursuant to Government Code sections 552.101, 552.103, and 552.108, and also under provisions of the Texas Medical Practice Act. You have submitted representative samples of the information which you have designated as exhibits A-G.² We have considered your claimed exceptions and reviewed the submitted information.

¹For convenience, we will refer to the categories in the first list as items A1-17, and the categories of the second list as B1-7.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As a preliminary matter, we address your concerns regarding information which you state may be in the possession of Reverend Vance MacDonald. Incorporated into the request for items A4-6, A12-13, and A15-16, the requestor asks for information which is possibly in Rev. MacDonald's possession. You assert that Rev. MacDonald is not an employee, agent, or representative of the county and, as such, the county has no ability to secure those documents, if any. The Public Information Act does not ordinarily require a governmental body to obtain information not in its possession. See Open Records Decision Nos. 558 (1990), 499 (1988). Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Consequently, if neither the county nor any entity acting on behalf of the county has possession of, or a right of access to, some of the documents responsive to items A4-6, A12-13, and A15-16, then the county has no obligation to create or produce such information.

In items A1 through A7, the requestor asks for copies of "all correspondence" between various county entities and others regarding a former settlement of Mr. Johnson's claims against the county.³ You state that the only responsive information is correspondence between the county and outside legal counsel. You argue that this information is protected from disclosure by Government Code sections 552.101 and 552.103(a). You have submitted representative samples of the correspondence, labeled as exhibit C.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You explain that although Mr. Johnson's claims were formerly settled on April 26, 1999, he has demanded additional damages for claims arising out of the same incident. You further explain that an action for declaratory judgment is currently pending. You have submitted a copy of the former settlement agreement, the demand letter from Mr. Johnson's counsel dated September 10, 1999, which remarks upon the former settlement, a copy of the county's original petition for declaratory relief wherein the county asserts the validity of the former

³The named entities and individuals are: the county, the county district attorney's office, any county commissioner, any county commissioners' court employee, the county sheriff's office, any employee or representative of the county sheriff's office, and Reverend MacDonald.

agreement, and a copy of Mr. Johnson's original answer.

Exhibit C includes a cover letter from outside counsel to a county district attorney, an attached copy of the unsigned settlement agreement, and handwritten notes. After reviewing the submitted information, we conclude that litigation is pending and the information in exhibit C is related to that litigation. You have fulfilled your burden of showing that section 552.103(a) is applicable. Thus, you may withhold the information pursuant to section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In item A8, the requestor asks for memoranda and reports generated or possessed by various county entities and others regarding the settlement of Mr. Johnson's claims against the county. You have submitted the April 26, 1999 settlement agreement, labeled as exhibit 1. You state that the settlement document will be released to the requestor, but argue that the remaining information is excepted from disclosure based on sections 552.101 and 552.103(a). As discussed above, we agree the information is related to the pending litigation and may be withheld from disclosure pursuant to section 552.103(a).

In item A17, the requestor asks for information relating to various county policies and procedures. You state that all applicable policies relevant to A17a-i will be released to the requestor, but assert that there are no documents responsive to A17j-m. As stated above, the county is under no obligation to create or produce information which does not exist.

In item B1, the requestor asks for all audiotapes, photographs, or videotaped recordings of Mr. Johnson. You argue this information is excepted from disclosure by sections 552.103(a) and 552.108(a)(1) and by the previous ruling in Open Records Letter No. 99-3567 (1999). After reviewing the request and the county's responsive arguments upon which Open Records Letter No. 99-3567 was based, we agree that this information was ruled upon in that decision. Therefore, you may withhold this information in accordance with that decision.

In item B3, the requestor asks for all evidence provided to the grand jury regarding any claim by a county employee that Mr. Johnson injured or threatened them. You state that information responsive to this request is included within exhibits A and B. In item B7, the requestor asks for "[a]ll Internal Affairs final reports as to the conduct of the officers and their involvement with the custody of Ollie Johnson." You have submitted representative samples of this information which you have labeled as exhibit G. You state that the information in the internal affairs investigation file is information which was also presented

to the grand jury. You argue that the information contained in these three exhibits is excepted from public disclosure by section 552.101 in conjunction with article 20.02 of the Texas Code of Criminal Procedure.

Section 552.101 excepts information that is confidential by law, including information made confidential by statute. Article 20.02(a) of the Code of Criminal Procedure states that "[t]he proceedings of the grand jury shall be secret." In Open Records Decision No. 513 (1988), this office concluded that a request for "all information 'collected, assembled or maintained'" by a district attorney's office relating to individuals and companies investigated or indicted in connection with an investigation into contract mismanagement was not sufficiently specific to implicate responsive information as revealing grand jury deliberations. In the instant case, we conclude that exhibits A and B, as responsive to the specific request for information regarding any claim by a county employee that Mr. Johnson injured or threatened them, would reveal the deliberations of the grand jury. However, the request for all internal affairs reports as to the conduct of the officers and their involvement with the custody of Mr. Johnson is not sufficiently specific to reveal the deliberations of the grand jury. As was stated in Open Records Decision No. 513, you "may not withhold your entire investigation simply because the grand jury considered some of the information the district attorney's office collected." Therefore, we conclude you must withhold exhibits A and B pursuant to section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure, as information that reveals the proceedings of the grand jury. You may not, however, withhold exhibit G based on this claimed exception.

You also argue exhibit G is exempt from public disclosure pursuant to subsection 552.108(a)(1). Subsection 552.108(a)(1) excepts from public disclosure information which would "interfere with the detection, investigation, or prosecution of crime[.]" You explain that the information relates to a criminal case that is currently pending. Based on this representation and a review of the information, we conclude exhibit G may be withheld pursuant to subsection 552.108(a)(1). However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. See Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the county must release the type of information that is considered to be front page offense report information to the extent that it appears in the responsive information. Thus, with the exception of the basic front page offense information, the county may withhold exhibit G from disclosure based on subsection 552.108(a)(1). Although section 552.108 authorizes the county to withhold the remaining information from disclosure, the county may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007.

In item B2, the requestor seeks all witness statements (draft or final) regarding any investigation as to Mr. Johnson. You state that the responsive documents are included in

exhibits A and B. You argue this information is excepted from disclosure by sections 552.103(a) and 552.108(a)(1). In items A9-16, the requestor, in part, asks for information about the care and detention of Mr. Johnson while he was incarcerated in the county jail on April 30, 1998. You again state that information contained in exhibits A and B is responsive, claim that section 552.103(a) is the applicable exception. However, as our disposition of exhibits A and B is set forth above, we need not address these additional claimed exceptions.

In item B4, the requestor asks for all minutes of any meeting of the county Commissioner's Court regarding Mr. Johnson. You state that the minutes from the April 26, 1999 and September 27, 1999 meetings will be provided to the requestor. We assume by your representation that these were the only meetings wherein matters relating to Mr. Johnson were discussed.

In item B5, the requestor seeks all documentation of healthcare provided to Mr. Johnson while he was imprisoned in the county jail. You have submitted representative samples of these records which you have marked as exhibit E. You argue Mr. Johnson has failed to execute a proper authorization for release of the information in accordance with Government Code section 552.229 and the Medical Practice Act.

Confidential medical records may only be released in accordance with the Texas Medical Practice Act (the "MPA"). *See* Open Records Decision No. 598 (1991). The MPA, Title 3, Subtitle B of the Occupations Code, section 159.002(b) provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

You explain that the only release submitted by the requestor was a release by Mr. Johnson that is attached to the instant request. That release is titled "AUTHORIZATION FOR RELEASE OF LEGAL INFORMATION & RECORDS."

Section 159.005 provides the consent requirements by which medical records are to be released. In pertinent part, section 159.005 provides as follows:

(a) Consent for the release of confidential information must be in writing and signed by:

(1) the patient;

....

(b) The written consent must specify:

(1) the information or medical records to be covered by the release;

(2) the reasons or purposes for the release; and

(3) the person to whom the information is to be released.

Section 159.004 of the MPA provides certain exceptions to confidentiality. As applicable to the instant request, that section provides as follows:

An exception to the privilege of confidentiality in a situation other than a court or administrative proceeding, allowing disclosure of confidential information by a physician, exists only with respect to the following:

...
(5) A person who has the written consent of the patient . . . for the release of confidential information, *as provided by Section 159.005*[.]

(Emphasis added). Therefore, although the requestor had Mr. Johnson's consent for the release of information and records relating to him, the requestor nevertheless has failed to meet the specific requirements for the release of Mr. Johnson's medical records as is required by the MPA. We note, however, that some of the information you argue is excepted under the MPA is not a "record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician" and, thus, is not confidential information. Therefore, you must withhold the majority of the requested medical records, but must release the information we have marked.⁴

In item B6, the requestor asks for all police reports or records regarding Mr. Johnson. You have submitted an offense report as a representative sample of this information which you have labeled as exhibit F. You assert that this information is excepted from disclosure by Government Code sections 552.103(a) and 552.108.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). We note at the outset that the requestor is essentially asking for a compilation of criminal history information. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (concluding that federal regulations which limit access to criminal history record information that states

⁴You also state that an additional issue exists in that the Lubbock County Hospital d/b/a/ University Medical Center provides healthcare services to inmates in the county jail. You further explain that the records are housed in the county jail, but are prepared and maintained by the county hospital district. We reiterate that section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Therefore, upon receipt of a proper consent for release, the county, whether it be the county jail or the county hospital district, must release the medical records.

obtain from the federal government or other states recognize privacy interest in such information). Similarly, open records decisions issued by this office acknowledge this privacy interest. *See* Open Records Decision Nos. 616 (1993), 565 (1990). In the present case, the requestor is asking for unspecified records in which Mr. Johnson is identified. Thus, we find that his right of privacy has been implicated to the extent that he is identified as a suspect. Therefore, all compilations of Mr. Johnson's criminal history must be withheld pursuant to section 552.101. In summary, the information in its entirety is excepted from disclosure and must not be released pursuant to section 552.101 of the Government Code. Because section 552.101 is dispositive, we need not address your section 552.108 or 552.103 claims.

You have submitted exhibit D which you state is responsive to the request for information regarding Mr. Johnson's April 30, 1998 imprisonment as requested in items A9-16. You argue the information contained in this exhibit is excepted pursuant to subsection 552.108(a)(1) because the trespass charge for which Mr. Johnson was arrested on that date remains pending. Subsection 552.108(a)(1) excepts from public disclosure information which would "interfere with the detection, investigation, or prosecution of crime[.]" You state that the representative sample, submitted as exhibit D, relates to a pending criminal case. Therefore, we conclude the information contained in exhibit D may be withheld pursuant to subsection 552.108(a)(1). However, as stated above, the county must release the type of information that is considered to be front page offense report information.

In summary, the information contained in exhibits A, B, C, D, F, and G, and some of the information in exhibit E, is excepted from public disclosure. Some of the information in exhibit E must be released to the requestor. The information contained in exhibit C is excepted from public disclosure pursuant to section 552.103(a). All audiotapes, photographs, or videotaped recordings of Mr. Johnson are excepted from public disclosure in accordance with Open Records Letter No. 99-3567. The information contained in exhibits A and B is excepted from public disclosure by section 552.101 in conjunction with article 20.02 of the Texas Code of Criminal Procedure. Except for basic front page information, the information contained in exhibits D and G is excepted pursuant to subsection 552.108(a)(1). Some of the documents contained in exhibit E are excepted from disclosure pursuant to the MPA until Mr. Johnson provides a proper consent form pursuant to section 159.005; you must release the portions of exhibit E that we have marked. The information contained in exhibit F must be withheld under common-law privacy.

This letter ruling is limited to the particular records at issue in this request and to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 136671

Encl. Submitted documents

cc: Rebecca Hamilton
c/o B.J. Hemmeline
Criminal D.A.'s Office County Of Lubbock